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No. 79-1946

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES MORAN, PETITIONER

v.

GOULD CORPORATION AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

Page

Cases:

Indiana & Michigan Electric Co. v. *NLRB*, 599 F. 2d 227 3

Precision Castings Co., 233 N.L.R.B. 183 3

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 4

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(3), 29 U.S.C. 158(a)(3) 3

Section 8(a)(4), 29 U.S.C. 158(a)(4) 3, 4

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1. Petitioner was a shop steward employed by respondent Gould Corporation. The collective bargaining agreement between Gould and Local 1612, United Automobile, Aerospace and Agricultural Implement Workers of America, contained a no-strike clause that provided for discipline or discharge of employees who struck in violation thereof and required union officials to take positive steps, including ordering the employees back to work, to terminate any unlawful work stoppages. (Pet. Supp. App. 23a-25a.)

On October 13, 1976, a number of employees, disgruntled over a delay in resolving a grievance, stopped work and congregated in the time-clock area. The foreman sought out petitioner, who was having coffee, and asked him to return to his work area. The foreman explained that it was as much the steward's responsibility as the foreman's to help get the employees back to work, and added that the "thing" might break up if the steward returned to his work area. Petitioner replied that he was not going back to work until the grievance was favorably resolved. The foreman then attempted to enlist the aid of a second foreman in getting the men to resume work, but petitioner protested that federal law gave the employees the right to assemble. When the foreman urged the men to return to work, petitioner declared that "we ain't going back to work until we find out what's going to happen [on the grievance]." The work stoppage lasted approximately two hours and ended through the intercession of the union. (Pet. Supp. App. 26a-27a.)

Following an investigation of the strike, respondent Gould Corporation decided to single out petitioner for discharge. It prepared an internal progress report that cited petitioner's failure to comply with his supervisor's instructions "to assist in returning the employees to work and to return to work himself." Subsequently, at a fourth-stage grievance meeting, a union request for lesser discipline was rejected by the company because of petitioner's previous violations of the appropriate procedures for resolving disputes, including participation in a prior unlawful work stoppage and the filing of charges with OSHA, EEOC and the NLRB. (Pet. Supp. App. 27a-29a.)

2. The Board, by a divided vote, found that the discharge of petitioner violated the National Labor Relations Act. It agreed with the administrative law judge

that the "discipline of [petitioner] was based on [his] union status rather than on his conduct as an employee." Relying on *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), where it had found unlawful an employer's sanctions imposed only against the union stewards and not against the other employees who participated in an unauthorized strike, the Board held that the discipline of petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). The Board also upheld the administrative law judge's conclusion that the discharge of petitioner violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), since his discharge "was affected or motivated, in part, by the fact that [he] had filed charges with or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB." Finally, the Board entered an order requiring the Company, *inter alia*, to reinstate petitioner with back pay. (Pet. Supp. App. 5a-6a, 29a-31a.)

3. The court of appeals, agreeing with the decision of the Seventh Circuit in *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227 (1979), held that an employer may single out for discipline a union steward who fails "to discharge his contractual obligation as a union officer to take steps to terminate [a] work stoppage" (Pet. App. 3a, 8a).[1] It thus overturned the Board's finding that petitioner was discharged in violation of Section 8(a)(3) of the Act. The court also rejected the Board's determination of a violation under Section 8(a)(4), concluding that the finding of a causal connection between the filing of the charges and the discharge was not supported by substantial evidence. (Pet. App. 9a, 12a, 14a-15a.)

4. Petitioner does not challenge the court of appeals' holding, contrary to that of the Board, that an employer may, without violating Section 8(a)(3) of the Act, single

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[1]The court of appeals' decision is reported at 612 F. 2d 728.

out for discipline a union steward who violates a contractual obligation to take steps to terminate an unlawful work stoppage. Rather, the only issue raised in the petition is whether substantial evidence supports the Board's further finding that petitioner's discharge also violated Section 8(a)(4) of the Act because it was motivated in part by his resort to the Board and other federal agencies.

The Board believes that the court erred in concluding that substantial evidence did not support the finding that petitioner was discharged in part because of his activities in filing charges and complaints with federal agencies.[2] However, the Board did not file its own petition because its disagreement with the court on this point raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Should the petition for a writ of certiorari be granted, the Board will defend its Section 8(a)(4) finding and its remedy therefor.

Respectfully submitted.

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[2]The court's amended decision accepts the legal position of petitioner and the Board that a discharge motivated in part by the employee's protected activity is unlawful notwithstanding the concurrent existence of a valid ground for discharge (Pet. App. 14a-15a).

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